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Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 65

PERCIVAL E. MAGEE, PETITIONER,

v.

THE UNITED STATES, RESPONDENT.

Reply Brief for Petitioner.

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(35,322)

INDEX.

	Page.
Statement	1
Argument	1
The Act of May 29, 1928, is a later enactment than Section 611 of the Revenue Act of 1928	2
The repeal of Section 611 is not merely by implication	6
The rule of construction that special prevails over general legislation does not apply here	8
Conclusion	9

CASES CITED.

Breitung *v.* Lindauer, 37 Mich. 217	7
Burgess *v.* Salmon, 97 U. S. 381	4
Ellis *v.* Page, Pick. 45 (Mass.)	6
Graham and Foster *v.* Goodcell, No. 36, October Term, 1930	3
Graham *v.* Muskegon County Clerk, 116 Mich. 571	7
Lapeyre *v.* United States, 17 Wall. 191	4
Mascot Oil Company *v.* United States, No. 400, October Term, 1930	2
Porter *v.* Edwards, 114 Mich. 640	7
United States *v.* Tynen, 11 Wall. 88	7

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REPLY BRIEF FOR PETITIONER.

STATEMENT.

This reply brief is addressed to the argument of the respondent that Section 611 of the Revenue Act of 1928 was not repealed by the Act of May 29, 1928, c. 901, Sec. 3, 45 Stat. 986, 996. The argument that Section 611 has not been repealed appears at pages 10 to 15 of respondent's brief.

ARGUMENT.

At page 12 of the respondent's brief it is frankly stated the Government is contending that Section 611 of the Revenue Act of 1928 is a limitation on the authority vested in the Commissioner of Internal Revenue by Section 3220 of the Revised Statutes, to remit, refund and pay back taxes erroneously or illegally assessed or collected as well as a limitation on the authority of the Commissioner of Internal Revenue to credit an overpayment or to refund any remaining balance under Section 252 of the Revenue Acts of 1918 and 1921 and Sections 272 and 281 of the Revenue Act of 1924 and Sections 272 and 284 of the Revenue Act of 1926.

In order to maintain its position in these Section 611 cases the respondent must convince the Court that the authority of the Commissioner of Internal Revenue under Section 3220 of the Revised Statutes to remit, refund and pay back a tax illegally collected is limited by the provisions of Section 611 of the Revenue Act of 1928. The respondent contends that Section 611 is a limitation on the authority of the Commissioner of Internal Revenue to remit and pay back a tax illegally collected after the expiration of the statute of limitations and starting from this basis the respondent proceeds to further argue that Section 611 is to be extended to be a limitation on the authority of the petitioner to sue for the recovery of the amount so illegally collected. The petitioner submits that this argument is not supported by reason or authority and is contrary to the clear intent of Congress which appears in Sections 607, 611 and 619(b) of the Revenue Act of 1928 and in Sections 3220 and 3226 of the Revised Statutes.

It is the position of the petitioner that Section 611 is merely a modification of the provisions of prior revenue acts relating to the auditing of returns and the crediting of overpayments or the refunding of any remaining balances and was never intended to be a limitation on the authority of the Commissioner of Internal Revenue to remit, refund and pay back a tax illegally collected. It is further the position of the petitioner that in so far as Section 611 might otherwise be construed to have the effect for which the respondent contends that it has been repealed. See original brief, page 20, and petitioner's brief in *Mascot Oil Company* v. *United States*, No. 400, at page 38.

The position of the petitioner with reference to the reenactment of Section 3220 of the Revised Statutes and to the repeal of the provisions of the Revenue Act of 1928 is that Section 619(b) of the revenue act has been repealed in its entirety and to the extent that it might be construed to conflict with the provisions of Section 3220 of the Revised Statutes, as later enacted, Section 611 of the Revenue Act of 1928 has been repealed and superseded. The petitioner does not contend that Section 611 has been repealed in its entirety, for it still stands for the guidance of the Commissioner of Internal

Revenue in the making of credits of overpayments, but that it has no application whatever to limit the authority of the Commissioner to remit or pay back a tax illegally collected.

The Act of May 29, 1928, c. 901, Sec. 3, is a later enactment than Section 611 of the Revenue Act of 1928:

In Section 1 of the Revenue Act of 1928 it is provided that the provisions of prior acts "shall remain subject to the applicable provisions of prior Revenue Acts, except as such provisions are modified by Titles III, IV, and V of this Act or by *legislation enacted subsequent to this Act.*"

Congress has here provided that Section 611, which is in Title IV, shall give way to subsequent legislation. Congress has carefully limited the application of Section 611.

In the Government's brief in the case of *Graham & Foster* v. *Goodcell*, No. 36, at page 28, reference is made to the Act of May 29, 1928, c. 901, Sec. 3, by which Section 3220 of the Revised Statutes was amended and reenacted, as a later enactment. The statement in the brief is:

> "The later change in Section 3220 by the Act of May 29, 1928, c 901, 45 Stat. 986, 996 (U. S. C. Sup. III, Title 26, Section 149), does not modify the effect of Section 619 so far as construing the purpose of Section 611 is concerned. The general effect of this later amendment of Section 3220 is discussed in the Government's brief in *Magee* v. *United* States, No. 65, present term."

It is to be noted that in its brief in that case, the Government admits that Section 3220 of the Revised Statutes is a later act but contends that it does not modify the effect of Section 619 in so far as construing the purpose of Section 611 is concerned. In its brief in this case, at page 13, the Government states that it does not appear that the Act of May 29, 1928, c. 901, Sec. 3, is a later enactment and further the Government refers to the fact that the Statutes at Large do not show the hour of the day on which the Act was approved by the President.

The Revenue Act of 1928 was approved at 8 A. M. on May 29, 1928. An examination of the Congressional Record dis-

closes that the Act of May 29, 1928, c. 901, Sec. 3, was not passed by Congress until some time during the afternoon of that day and between the hours of 1.30 and 5.30 P. M. The Act of May 29, 1928, c. 901, Sec. 3, was passed by Congress as H. R. 12064 and was approved by the President as Public Document No. 611. The Revenue Act of 1928 was passed as H. R. No. 1 and approved by the President as Public Document No. 562. The Congressional Record, Vol. 69, Part 10, at page 10515 discloses that the Senate of the United States on the day of May 29, 1928, recessed from 1.20 P. M. to 1.30 P. M. and was in continuous session thereafter until 5.30 P. M. The Congressional Record, Vol. 69, Part 10, at pages 10613 and 10615 discloses that H. R. 12064 was debated and passed by the Senate at some time later than 1.30 P. M. of that day. The Congressional Record, Vol. 69, Part 10, at pages 10680 and 10749 discloses that the bill was passed by the House following a recess which expired at 12 o'clock noon of that day. The Record, at pages 10887 and 10888 discloses that H. R. 12064 was approved by the President during the afternoon of that day and this appears to have been done just prior to adjournment. The petitioner therefore submits that the position of the Government that it does not appear that Section 3220 of the Revised Statutes was amended and reenacted subsequent to 8.00 A. M. on May 29, 1928, is not correct. The Congressional Record clearly discloses that the bill was passed by the Senate and approved by the President at some hour subsequent to 1.30 P. M. of that day. The Act of May 29, 1928, c. 901, Sec. 3, is the later enactment.

In the Government's brief it is further stated that the Revenue Act of 1928, and the Act of May 29, 1928, c. 901, Sec. 3, were approved by the President on the same day and the contention is made that they should be construed together as one enactment and in support of this *Lapeyre* v. *United States*, 17 Wall. 191, is cited to the effect that the hour of the approval of a statute will not be considered. The Government also cites the case of *Burgess* v. *Salmon*, 97 U. S. 381. On examining the latter case it is found that the statement in the case of *Lapeyre* v. *United States*, *supra*, that the hour of the day

should not be considered, is qualified and distinguished. During the course of the opinion this Court stated:

> "In *Lapeyre* v. *United States* (17 Wall. 191), it was said obiter, 'The act became effectual upon the day of its date. In some cases it is operative from the first moment of that day. Fractions of the day are not recognized. An inquiry involving that subject is inadmissible.' The question involved in that case was whether a proclamation issued by President Johnson, bearing date of June 24, 1865, removing certain restrictions upon commercial intercourse, took effect on that day, or whether it took effect on the day it was published and promulgated, which was on the 27th of the same month. It was held by a majority of this court that it took effect from its date. The question was upon the 24th or 27th of June, and the point of the portion of a day was not involved. While the general proposition may be true, that where no special circumstances exist, the entire day on which the act was passed may be included, there is nothing in that case to make it an authority on the point before us."

The question here involved is not the time of taking effect of the statute in the sense of determining the beginning of its force and effect, but we are concerned with the repeal of a prior act by a subsequent one and a determination of what is the latest expression of Congress. The passage of a later act is an expression of a later intent which must prevail. It is "legislation enacted subsequent to this Act" within the terms of Section 1 of the Revenue Act of 1928.

Congress was apparently aware of the fact that by the enactment of Section 619(b) it had complicated the administration of the tax laws and had placed a collector in the awkward position of being liable for a judgment against him personally which the Commissioner of Internal Revenue was prohibited from repaying. Under the circumstances it was necessary for Congress to repeal Section 619(b) and to re-enact Section 3220 of the Revised Statutes to give the Commissioner of Internal Revenue full and complete authority to repay a collector the amount of a judgment rendered against him with or without a certificate of probable cause.

The repeal of Section 611 is not merely by implication:

In the brief for the respondent it is contended that repeals by implication are not favored. This is of course a general rule of statutory construction which the petitioner does not controvert, but the petitioner submits that it has no application here. The intent of Congress is so clearly apparent that nothing is left to implication. The structure of Title IV of the Revenue Act of 1928 shows clearly beyond any implication that Congress felt that it was necessary to add Section 619(b) in order to make Section 611 a possible limitation on Section 3220 of the Revised Statutes, as the respondent contends, and when Congress in a later act repealed Section 619(b) by reenacting Section 3220 of the Revised Statutes and omitting the change made by Section 619(b) and further by expressly providing in the title of Section 3220 that the section "as amended, is amended" it can not be said to have repealed Sections 619(b) and 611 merely by implication. There is an irreconcilable conflict between Sections 611 and 619(b) as the respondent contends they should be construed, and Section 3220 of the Revised Statutes as later amended, because the same act or course of conduct can not be both lawful and unlawful at the same place and time and under the same circumstances. In *Ellis* v. *Page*, Pick. 45 (Mass.) it is stated:

> "It is a well-settled rule that when any statute is revised, or one act framed from another, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the legislature gross carelessness or ignorance; which is altogether inadmissible. We are not, therefore, at liberty to suppose that the proviso or exception was omitted by mistake.
>
> "The rule is thus laid down in Smith's Commentaries on Statutory Construction, Section 785: "Where some parts of a revised statute are omitted in the revising act, the parts omitted are not to be deemed as revived by construction, but are to be considered as annulled." And again, Section 786, *id.*: "A subsequent statute, revising the whole subject-matter of a former one, and evidently

> intended as a substitute for it, although it contains no express words to that effect, must, on principles of law as well as on reason and common sense, operate to repeal the former."

In *United States* v. *Tynen*, 11 Wall. 88, 92, it is stated:

> "* * * When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act."

In *Breitung* v. *Lindauer*, 37 Mich. 217, the Supreme Court of Michigan stated:

> "The rule is that the later act operates to the extent of the repugnancy, as a repeal of the first act, or, if the two acts are not in express terms repugnant, yet if the latter covers the whole subject of the first, and contains new provisions showing that it was intended as a substitute, it will operate as a repeal."

See also *Porter* v. *Edwards*, 114 Mich. 640 and *Graham* v. *Muskegon County Clerk*, 116 Mich. 571.

In these several enactments Congress left nothing to implication. The reenactment of a statute by express reference to it as "amended" and by stating that it "is amended" and by further omitting parts of the amended statute, is not an amendment merely by implication.

What Congress intended to do in the reenactment of Section 3220 of the Revised Statutes and what it has in fact done is to place Section 3220 on the statute books free from any possible limitations that it had previously placed on it by Section 611 and Section 619(b) of the Revenue Act of 1928. Nothing is open to argument here for the simple reason that

the latest Act of Congress speaks for itself and speaks clearly and positively. This Court can not ignore the latest expression of Congress in the Act of May 29, 1928, c. 901, Sec. 3.

The rule of construction that special prevails over general legislation does not apply here:

The respondent takes the position that Section 3220 of the Revised Statutes is general legislation while Section 611 of the Revenue Act of 1928 is special and that the rule that special legislation prevails over general has application here. This position of the respondent the petitioner submits is in direct conflict with the position that it has taken on other points in this case. At page 12 of the brief respondent states:

> "We are contending in this group of cases that Section 611 was likewise a limitation on the authority given the Commissioner by Section 3220."

In taking the position that Section 611 is a limitation on the authority of the Commissioner under Section 3220 of the Revised Statutes, the respondent means that the two sections refer to the same subject matter, the refund of taxes. The respondent should not, in one part of its brief contend that the two sections refer to the same subject matter and then on the other hand contend that the one is general legislation and the other is special. If the respondent is correct that Section 611 is to be construed to refer to the authority of the Commissioner of Internal Revenue to remit or pay back a tax illegally collected, then the section relates to the same subject matter and the latter prevails over the former.

The rule of statutory construction that a general statute must give way to one which is special is merely one of the rules of construction that the courts resort to in order to determine an intent of Congress which does not otherwise clearly appear.

In the present case the intent of Congress in the reenactment of Section 3220 of the Revised Statutes clearly appears and it is perfectly obvious that it intended Section 3220 to have full and complete force and operation and that Sections 619(b)

and 611 of the Revenue Act of 1928, should give way thereto, otherwise it would not have referred to Section 3220 of the Revised Statutes "as amended," meaning of course as amended by Section 619(b), and, to the extent that it may be construed to apply, by Section 611 of the Revenue Act of 1928. In the reenactment of Section 3220 of the Revised Statutes, Congress clearly appears to have been fully aware of the enactment of Section 619(b) and Section 611 of the Revenue Act of 1928, which are embraced in the reference to Section 3220 of the Revised Statutes, "as amended."

The decisions cited by the respondent that a later general provision does not repeal a special provision in a prior act do not support its position.

CONCLUSION.

To the extent that they might otherwise be construed to apply retroactively to limit the authority of the Commissioner of Internal Revenue to remit or pay back the amount of the tax illegally collected or to in any wise effect the right of the petitioner to its recovery, Section 611 and Section 619(b) have been repealed and superseded by the later Act of Congress in Section 3220 of the Revised Statutes, as amended by Act of May 29, 1928, c. 901, Sec. 3, 45 Stat. 996.

Respectfully submitted,

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